

REPUBLIC OF SOUTH AFRICA

BANKS AMENDMENT BILL

*(As amended by the Standing Committee on Finance
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 17B—2014]

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Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992, section 17 of Act 9 of 1993, section 43 of Act 26 of 1994, section 6 of Act 55 of 1996, section 10 of Act 36 of 2000, section 47 of Act 19 of 2003 and section 37 of Act 22 of 2013

2. Section 69 of the principal Act is hereby amended— 5
- (a) by the substitution for subsection (2C) of the following subsection:
- “(2C) (a) Notwithstanding the provisions of subsection (3), the curator may—
- (i) dispose of any of the bank’s assets;
- (ii) transfer any of its liabilities; or 10
- (iii) dispose of any of its assets and transfer any of its liabilities, in the ordinary course of the bank’s business.
- (b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 112 of the Companies Act— 15
- (i) dispose of any of the bank’s assets;
- [(ii) **effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.**] 20
- (ii) transfer any of its liabilities; or
- (iii) dispose of any of its assets and transfer any of its liabilities, otherwise than in accordance with the provisions of section 54[;].
- (c) In seeking consent for a disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph (b), the curator shall report to the Minister or the Registrar, as the case may be, on the expected effect on the bank’s creditors and whether— 25
- (i) the creditors are treated in an equitable manner; and
- (ii) a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer. 30
- (d) The Minister or the Registrar, as the case may be, must, in addition to the requirements of section 54, consider the curator’s report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that the Minister or the Registrar, as the case may be, may consent to the disposal, transfer or disposal and transfer, notwithstanding the fact that the effects in paragraph (c)(i) or (ii) are not achieved if it is reasonably likely to promote the maintenance of— 35
- (i) a stable banking sector in the Republic; or
- (ii) public confidence in the banking sector in the Republic.”; 40
- (b) by the substitution in subsection (3) for paragraph (f) of the following paragraph:
- “(f) to make and carry out [**in the course of the curator’s management of the bank concerned,**] any decision in respect of the bank which in terms of the provisions of this Act, the Companies Act, [**or**] the bank’s memorandum of incorporation or the rules of any securities exchange, on which any securities of the bank or its controlling company are listed, would have [**been**] required [**to be made by way of**] an ordinary resolution or a special resolution [**contemplated in section 65 of the said Act and in terms of the bank’s memorandum of incorporation**] of shareholders of the bank or its controlling company.”; 45 50
- (c) by the substitution in subsection (3) for paragraph (i) of the following paragraph: 55
- “(i) to cancel any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator: Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of any loss sustained by or damage caused to any person as a result 60

- of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation[.]”;
- (d) by the addition in subsection (3) of the following paragraphs:
- “(j) to raise funding from the Reserve Bank, or any entity controlled by the Reserve Bank, on behalf of the bank and, notwithstanding any contractual obligations of the bank, but without prejudice to real security rights, to provide security over the assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security;
- (k) without limiting any other power of the curator in terms of this section, to propose and enter into an arrangement or compromise between the bank and all its creditors, or all the members of any class of creditors, in terms of section 155 of the Companies Act.”.

Insertion of section 89A in Act 94 of 1990

3. The following section is hereby inserted in the principal Act, after section 89: 20

“Fair administrative action

89A. Any administrative action taken in terms of this Act, including any administrative action taken by a curator appointed in terms of section 69, is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).”.

Short title, commencement and application

4. (1) This Act is called the Banks Amendment Act, 2015, and takes effect when first published in the *Gazette* as an Act.
- (2) If, immediately before this Act takes effect, a bank is under curatorship in terms of section 69 of the principal Act, the provisions of this Act apply to the curatorship. 30

MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1 A sound banking system and financial stability are key to ensuring long-term sustainable economic growth. Failed banks have the potential to cause substantial disruption to the financial system, and impact the lives of ordinary South Africans, disrupt the ability of companies to function and reduce the savings of depositors in banks, bringing hardship to millions.
- 1.2 In order to promote the soundness of the banking system it is imperative that the regulation and supervision of banks are based on international standards and best practice. The framework for the regulation and supervision of banks and bank controlling companies in South Africa is contained in the Banks Act, 1990 (Act No. 94 of 1990) (“the Banks Act”), together with the regulations relating to banks made in terms of section 90 of the Banks Act.
- 1.3 Although the Banks Act contains extensive provisions relating to the resolution of a failed bank and concomitant powers afforded to the curator appointed to effect such resolution, it has become necessary to revise some of the provisions of section 69 of the Banks Act that are unnecessarily stifling such resolution efforts.

2. OBJECTS OF BILL

The objects of the Bill are to—

- (a) provide an alternative to the recovery of a bank within the existing corporate entity;
- (b) facilitate the transfer of all or part of a bank’s business to a successor entity pursuant to a transfer under section 54 of the Banks Act; and
- (b) facilitate the implementation of the above steps by the curator.

3. PROPOSED AMENDMENTS

- 3.1 Power of curator to dispose of assets:
 - (a) Although the curator is, amongst others, permitted to dispose of assets of the bank under curatorship pursuant to section 54 of the Banks Act, section 69(2C)(b)(ii) of the Banks Act, however, provides that such a disposal should enable the bank to pay its debts or meet its obligations and become a successful concern. In the context of a failed bank placed under curatorship, the requirement of becoming “a successful concern” as a result of a disposition of assets from such bank is illogical and unnecessarily stifling to any resolution process proposed by a curator.
 - (b) It is therefore proposed that section 69(2C) of the Banks Act be amended (clause 2(a) of the Bill) to enable the curator to enter into transactions in which the business of the bank is, in whole or part, transferred in circumstances where a reasonable probability exists that the transferee entity will be able to meet the transferred liabilities and that as a result of such transfer the bank’s creditors will not incur greater losses as a result of such transfer than would have been incurred if the bank had been wound up under section 68 of the Banks Act on the date of the proposed transfer. This will enable the transfer of assets of a bank under curatorship in terms of a prudent and responsible framework without the unnecessarily restrictive provision that the transfer would enable such a bank to “become a successful concern”.
- 3.2 Powers of the curator to manage the bank:
 - (a) Section 69(3) of the Banks Act enables the Minister to empower the curator, subject to conditions, to perform specified powers in respect of the bank. The curator may make decisions on behalf of the bank’s shareholders during the course of the management of the bank. This power does not extend to a bank having corporate shareholders. It is

proposed to amend section 69(3)(f) (clause 2(b) of the Bill) that the curator should also be able to make decisions on behalf of corporate shareholders, in order to avoid additional fetters on his or her ability to perform his or her duties.

- (b) It is proposed to empower the Minister to enable the curator to raise funds from the SARB, or any of its entities, and provide security over the assets in respect of such funding (addition of paragraph (j) to section 69(3) in clause 2(d) of the Bill). Section 69(6) provides that while a bank is under curatorship, all legal processes against the bank are stayed and may not be instituted or proceeded with without leave of the court. Like in the case of section 69(3)(g) and (i), it is also proposed in section 69(3)(j) to override section 69(6) and to allow the institution of claims against the bank for damages in respect of any loss sustained by, or damages caused to any person as a result of the security after the expiry of a period of one year from the date of the provision of the security.
- (c) It is also proposed that the Minister may enable the curator to propose and enter into an agreement or compromise between the bank under curatorship and all its creditors in terms of section 155 of the Companies Act (clause 1 and the addition of paragraph (k) to section 69(3) in clause 2(d)).

- 3.3 In clause 3 of the Bill express provision is made that any administration action taken in terms of the Banks Act, including by a curator, is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

Consultation with various stakeholders was undertaken which included the South African Reserve Bank, the Registrar of Banks, individual banks, auditing firms, bank creditor groups and external Senior Counsel.

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill will modernise South Africa's approach to resolving banks in distress. This will reduce potential future financial costs to the State by reducing the potential future costs.

6. CONSTITUTIONAL IMPLICATIONS

None

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the National Treasury are both of the opinion that this Bill must be dealt with in terms in accordance with the procedure established by the provisions of section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

- 7.2 We have considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), which provides for procedures that Bills must follow in Parliament. Section 75 deals with ordinary Bills not affecting provinces.

- 7.3 The Constitutional Court judgement in the case of Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/9 [2010] ZACC 10 at paragraphs 70 and 72, stated that—

“the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.”

- 7.4 This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill. This Bill seeks to provide an alternative to the recovery of a bank within the existing corporate entity, to facilitate the transfer of all or part of a bank's business to a successor entity pursuant to a transfer under section 54 of the Banks Act and to facilitate the implementation of the said measures by the curator. These matters do not fall within any of the matters listed in section 76(3) of, or Schedule to, the Constitution. In our view this Bill is therefore an ordinary Bill not affecting the provinces as envisaged in section 75 of the Constitution.
- 7.5 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of the provisions of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

